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No. 16,483

IN THE

United States Court of Appeals

For the Ninth Circuit

See AB80 3112

DR. ROBERT L. HARGRAVE,
Appellant,

vs.

E. G. WELLMAN, doing business as Wellman Enterprises,
Appellee.

Appeal from the United States District Court for the District of Montana.

BRIEF OF THE APPELLANT.

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STATEMENT OF THE CASE.

This is an action to recover damages for personal injuries arising out of a horseback ride in Glacier National Park, Montana. The action was commenced in the United States District Court at Great Falls, Montana, by Robert L. Hargrave, M.D. of Wichita Falls, Texas. It was brought against E. G. Wellman operating a business in Glacier National Park under the name of "Wellman Enterprises". Mr. Wellman's business consisted of renting pack and saddle horses to tourists in the Glacier National Park.

Hargrave, plaintiff below, rented a horse from the Wellman Enterprises at Many Glaciers Hotel which was located in the National Park. The purpose of such rental was to ride to a scenic point known as "Lake Josephine" to take colored pictures (Tr. p. 86). Hargrave was accompanied by his 15 year old daughter and the party was led by a guide, Dillon, who was an employee of the Wellman Enterprises. The trip to Lake Josephine was uneventful. On the return to the hotel, the guide Dillon suddenly and without warning spurred his horse down the trail at a rapid gait. This sudden movement by the lead horse ridden by the guide caused the horse upon which Hargrave was riding to suddenly lunge forward and begin to run. The sudden jolting and bumping of his mount caused extreme trauma to Hargrave's back, resulting in compression fracture of the 12th dorsal vertebra. This injury to the plaintiff Hargrave resulted in permanent damage and interference with his ability to practice medicine and surgery.

Prior to the ride, Hargrave, Plaintiff below, received no instructions nor warning of the propensity of his horse to bolt or run upon the movement of other horses. It is the theory of the Appellant, Plaintiff below, that the guide Dillon knew of the propensity of this horse and was negligent in galloping his horse, when he knew or should have known that the horse upon which Hargrave was riding would immediately bolt and gallop.

Trial was had to a jury in this cause. Following erroneous oral and written charges, the jury returned a

verdict for the Defendant, Appellee herein. From such verdict and resulting judgment, this appeal has been duly perfected.

STATEMENT OF THE PLEADINGS.

By agreement of counsel, it was stipulated that Plaintiff's case should proceed on the sole theory of negligence of the Defendant's guide Dillon, who Plaintiff alleged suddenly galloped his mount without warning, thus causing Plaintiff's mount to bolt, gallop and run suddenly, resulting in serious and severe injuries to Plaintiff.

Plaintiff did not waive his written request, made before trial, to amend his complaint under and by virtue of Federal Rule 15(b). In this request he alleged as an additional count of negligence that the Defendant's guide failed to warn Plaintiff as to the traits of Plaintiff's mount respecting the fact that it would follow and perform in the same manner and gait as the Defendant's guide's mount would do.

COURT'S JURISDICTION.

The Honorable District Court had jurisdiction of this case in that there was a diversity of citizenship between the parties and the amount in controversy exceeded the sum of $3,000.00 (Title 28, U.S. Code, Sections 1332 and 1391).

This appeal has been duly and timely filed by Appellant as a result of the errors committed by the Trial Court, first in failing to allow Appellant to

amend his complaint, as provided by Federal Rule 15(b); second, due to the Trial Court's erroneous instruction to the jury on the doctrine of assumption of risk; third, the refusal of the Trial Court to submit written instructions, timely requested by Appellant on the issues of bailment, common carrier and implied warranty.

POINTS OF ERROR.

POINT ONE.

The Court erred in instructing the jury on assumption of risk (Tr. p. 320), when such doctrine was not applicable. Assumption of risk is an affirmative defense and must be proven by the Defendant. The record is devoid of evidence that Appellant had any knowledge of the propensity of his mount to gallop or run, he having hired a horse to walk only along a short mountain trail.

POINT TWO.

The Court erred in failing to submit to the jury a timely written instruction offered by Appellant on hiring of animals as a bailment and that a bailor of animals has a duty to inform a bailee respecting habits, traits or propensities of such animals.

POINT THREE.

The Court erred in failing to submit to the jury a timely written instruction relative to the duty of a common carrier to exercise the utmost care and dili-

gence on behalf of persons carried for hire, it being undisputed that the Appellee was a person engaged in carrying persons from place to place in Glacier National Park for hire or reward.

POINT FOUR.

The Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to invitees, in that the undisputed evidence raised such instructions and issues.

POINT FIVE.

The Court erred in failing to instruct the jury relative to the law of implied warranty in bailment contracts. Appellant submitted timely written instructions on this point and the Court failing to give same, the jury was prevented from considering this legal position taken by Appellant which might have allowed the jury to find a breach of implied warranty on the part of the Appellee.

POINT SIX.

The Court erred in failing to submit written instructions and issues, which were timely submitted, relative to the application of the law of contributory negligence, as defined and tendered by the Plaintiff.

POINT SEVEN.

The Court erred in failing to allow Appellant to amend his complaint (Tr. p. 16), as provided by Rule 15(b), so that Appellant could urge, as an additional count of negligence, that Appellee's guide had failed to instruct Appellant as to the trait of his mount in that it would follow and perform in the same gait which the leading mount would do.

STATEMENT AND ARGUMENT REGARDING POINT ONE.

Appellant maintains that the District Court erred in instructing the jury on assumption of risk because at no place in the record is there any evidence which would support an instruction to the jury regarding this doctrine.

It is a well established common law that knowledge and appreciation of the danger is an essential element of the defense of assumption of risk. To make a case of assumption of risk, it is not enough that the injured party know of the thing from which harm might come; he must know and appreciate the danger from which he suffered.

The doctrine of assumed risk does not apply unless the particular condition of peril has continued long enough so that the person alleged to have assumed the risk can be found to have known or have been charged with knowledge of the dangers. The doctrine of assumed risk is based upon voluntary exposure to danger and is applicable only in cases where the in-

jured person might reasonably elect whether or not he should expose himself to peril. 38 *Amer. Juris.*, p. 845. *Alexander v. Great Northern Railroad,* 51 Mont. 565, 154 Pac. 914; *Westlake v. Keating G. Min. Co.,* 48 Mont. 120, 136 Pac. 38; *Osterhold v. Boston & Mont. etc. Co.,* 40 Mont. 508, 107 Pac. 499; *O'Brien v. Corra-Rock Island Min. Co.,* 40 Mont. 212, 105 Pac. 724; *McCabe v. Montana C. Ry. Co.,* 30 Mont. 323, 76 Pac. 701.

Knowledge of the risk is the watchword of assumption of risk. 59 Cinn. *N. O. & T. P. R. Co. v. Thompson* (6th CCA 1916) 236 Fed. 9. Ordinarily the plaintiff will not be taken to assume any risk of conditions or activities of which he is ignorant. *Shanney v. Boston Madison Square Garden Corp.,* 1936, 296 Mass. 168, 5 N.E. 2d 1; *Dahna v. Fun House Co.,* 1927, 204 Iowa 922, 216 N.W. 262; *Tantillo v. Goldstein Bros. Amusement Co.,* 1928, 248 N. Y. 286, 162 N.E. 82; *Baltimore & O. S. W. R. Co. v. Carroll,* 1928, 200 Ind. 589, 163 N.E. 99. Further, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself. *Choctaw O. & G. R. Co. v. Jones,* 1906, 77 Ark. 367, 92 S.W. 244, 4 L.R.A. N.S. 837 & Ann. Cas. 430; *Chapin's* Cas. Torts, 2d Ed. 300; *Fitzgerald v. Connecticut River Paper Co.,* 1891, 155 Mass. 155, 29 N.E. 464, 31 Am. St. Rep. 537; *Zurich General Accident & Liability Ins. Co. v. Childs Co.,* 1930, 253 N. Y. 324, 171 N.E. 391; *Federal Compress & Warehouse Co. v. Harmon,* 1938, 196 Ark. 417, 118 S.W. 2d 239. If, because of lack of information, he does not comprehend the risk involved in a

known situation, he will not be taken as to assume such risk. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but the defense of contributory negligence.

The record in this case is void of evidence to show that the Appellant, Robert L. Hargrave, had any knowledge that the horse upon which he was mounted would suddenly bolt and run and/or gallop along the trail in the park.

Appellant testified that he rented his mount along with his daughter's mount, for the purpose of riding up to Lake Josephine and return. Further, he testified that he was not an experienced rider (Tr. p. 80), nor acquainted with the traits of saddle horses.

The record being void of evidence that Appellant had knowledge that his mount might commence to gallop, run or canter, it was improper for the District Judge to instruct the jury on assumption of risk, as Appellee, Defendant below, failed to discharge his burden proving knowledge of the risk on the part of the Appellant, which would have made the doctrine applicable.

Should it be argued that Appellant failed to exercise ordinary care to discover his danger, then the theory of assumption of risk would not apply, but would rather be properly charged as a defense of contributory negligence, and such defense was waived by the Appellee's own admission in the above cause (Tr. p. 316).

Certainly, when inexperienced travelers enter into agreements with skilled and professional carriers for hire in Glacier Park, Montana, to provide horseback trips to and from various places in the park, it cannot be held that such inexperienced persons assume the risk of everything that a horse may do. The general public has a right to be protected from and/or warned about propensities of horses, such as galloping, cantering or running. It is common knowledge among horsemen that inexperienced riders are for the most part unable to properly control and maintain themselves on a horse under such a gait.

A risk is not assumed where the conduct of the Defendant has left the Plaintiff no reasonable alternative. Evidence in this case indicates that the Appellee's guide caused Appellant's horse to gallop or run (Tr. pp. 200-201), and that the Appellant had no alternative but to attempt to remain in the saddle and stay mounted on the horse. He did not have an opportunity to dismount or avoid such active movement on the part of his mount. By placing the Appellant in such a situation or dilemma, the Appellee has deprived the Appellant of his freedom of choice and so can not be heard to assert that the Appellant has assumed the risk of such peril.

Certainly, in the case now before this Court, it was improper for the Trial Judge to allow Appellee, who caused the unusual situation or peril, through the galloping of its horse, to aver that the Appellant assumed the risk of such a perilous position created solely by the Appellee's negligence.

STATEMENT AND ARGUMENT REGARDING POINT TWO.

This case involves renting a horse for use in transport. It is fundamental that a hiring of animals is a bailment.

A bailor of a horse is liable for injuries resulting therefrom if he should have known of its unsuitability for the purpose for which it is hired. *Dam v. Lake Aliso Riding School* (Calif. 1935), 48 P.2d 98, Aff'd 57 P.2d 1315; *Palmquist v. Mercer,* 272 P.2d 26; *Kersten v. Young,* 125 P.2d 501 (Calif. 1942); *Evans v. Upmier,* 16 N.W.2d 6 (Iowa 1944); *Conn v. Hunsberger,* 73 A. 324 (Penn. 1909), 25 L.R.A. (N.S.) 372; *Mateas v. Fred Harvey,* 9th CCA, 146 F.2d 989 (Ariz. 1945); and *Herbert v. Ziegler,* 139 A.2d 699 (Mo. 1958).

In the case of *Mateas v. Fred Harvey,* in an opinion by Judge Stephens of this Honorable Court, the rule was restated in a portion of the opinion, which is set out as follows:

> "The rule is, as there announced, that:
> " 'Livery-stable keepers who let animals for hire are bound only to exercise ordinary care and diligence in providing an animal suitable for the purpose for which it is hired.' "
>
> "Hahn v. Rockingham Riding Stables, 126 N.J.L. 324, 19 A.2d 191, 192: '* * * From this (a corporation in business of hiring riding horses) it followed that the relationship of bailor and bailee, on this contract of hire, came into being between the parties and that the bailor impliedly warranted the horse as being fit for the purposes for which it was hired. * * *'

"Kersten v. Young, 1942, 52 Cal.App.2d 1, 125 Pac.2d 501, at page 503: 'At the outset it should be noted that in a contract of hiring with one who rents horses for riding purposes, in the absence of any notice to the contrary there is contained an implied warranty to the rider that the renter of the animal knew or had exercised reasonable care to ascertain the habits of the horse and that the animal was safe and suitable for the purpose for which the keeper hired the horse to the renter thereof. To inform himself of the habits and disposition of horses which he keeps at his stable for hire is the duty of a stable-keeper, and if he knows or in the exercise of reasonable care should ascertain the fact that his animals are dangerous or unsuitable, he is liable for injuries to his customers resulting from the vicious propensities of animals so hired to his customer. Dam v. Lake Aliso Riding School, 6 Cal. 2d 395, 399, 57 P.2d 1315.'

"Conn. v. Hunsberger, 1909, 224 Pa. 154, 73 A. 324, at page 325, 25 L.R.A. N.S., 372, 132 Am.St. Rep. 770, 16 Ann. Cas. 504: '* * * It is the duty of a livery stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous and unsuitable, or by the exercise of reasonable care could ascertain the fact, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and his ears, thereby remaining ignorant of the vicious habits of his horses, and relieve him from liability for injuries to a customer resulting from such habits. In his contract of hiring he impliedly engages that he knows, or has exercised reasonable care

to ascertain, the habits of his horses, and says to his customer that the horse which he lets is safe and suitable for the purpose for which he has hired it. His warranty is against defects or vicious habits, which he knows, or by the exercise of proper care could know; and, if he fails to exercise such care, and it occasions injury to his customer, he will not be relieved of liability, though he did not actually know the horse was unsuitable for the service. It is true a liveryman is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring. * * *'

"The California Supreme Court adopted the language quoted from Conn v. Hunsberger, supra, in the case of Dam v. Lake Aliso Riding School, 1936, 6 Cal. 2d 395, 57 P.2d 1315, 1318, and explained: '* * * Under this rule the so-called implied warranty is not a warranty in that sense which insures the suitableness of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired.' "

The Appellant offered at the time of submission of instructions in the above entitled cause an instruction which would have informed the jury that a bailor of animals has a duty to inform the bailee or rider of the habits, traits, or propensities of the animals if the rider or bailee might be injured unless such warning is given to him. The bailor or owner of the animal,

or his agent, servant and/or employee, has a duty to warn the rider or bailee before the commencement of a sudden gallop of the animals, if the owner or his agent, servant and/or employee were riding in company with the rider and bailee as a guide or one in charge of a riding trip.

The Honorable Court failed to give this requested instruction and the jury was thus uninformed as to the legal relationship existing between one who rents animals for hire and that of the person hiring the animals. The jury, not having proper instruction as to the law pertaining to the relationship proven to exist in this case, was prevented from considering the duty of a bailor to his bailee, thus depriving Appellant of a fair trial upon the issues involved.

STATEMENT AND ARGUMENT REGARDING POINT THREE.

The District Judge failed to submit written instructions relative to the law pertaining to common carriers. The undisputed evidence of the case raised the need for such instruction.

A carrier, according to the legal usage of the term, is one who, for hire, undertakes to transport persons or property from place to place. 9 *Am. Jur.* p. 429.

A contract for the carriage of property is a form or species of bailment, and the law of carriers, insofar as the transportation of property is concerned, is a development and extension of this phase of the law

of bailments. Insofar as it concerns the transportation of passengers, the common law of carriers is derived from the general principles of contracts, negligence, and torts. 9 *Am. Jur.* Section 1, p. 429. A common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally. 9 *Am. Jur.* Sec. 4, p. 430. Everyone who offers to the public to carry persons, * * * is a common carrier of whatever he thus offers to carry. Sec. 8-701 *RCM* (1947).

Decisions of the State of Montana require that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. Sec. 8-405 *RCM* (1947), *Phillips v. Butte Jockey Club,* 46 M. 338, 127 P. 1011; *Brown v. Columbia Amusement,* 91 M. 174, 6 P.2d 874.

In the case now before the Court, under this law the jury should have been instructed as to the degree of care owed riders of rented horses by Appellee. Without this instruction, the jury was not advised that the utmost care and diligence should have been exercised by Appellee's guide in the control of both his horse and the horse of Appellant. There was required an instruction regarding the duty owed by a common carrier, since Appellee was, from the evidence, a common carrier within the meaning of the Montana law (Tr. pp. 26-27). The jury, not having any instruction as

to the duty of the common carrier, had no occasion to judge the Appellee's guide's duty of using utmost care and diligence for and on behalf of persons being carried by his rented horses. This deprived the Appellant of a full trial on his issues and theories of recovery.

STATEMENT AND ARGUMENT REGARDING POINT FOUR.

Appellant maintains that the Honorable District Court erred in failing to instruct the jury relative to the law pertaining to invitees, in that the undisputed evidence raised such instructions and issues.

The owner who directly or impliedly invites others to enter his premises for some purpose of interest or advantage to him, owes to such persons a duty to use ordinary care in maintaining his property in a reasonably safe condition for use in a manner consistent with the purpose of the invitation and to not expose them to an unreasonable risk but to give them adequate and timely notice and warning. The liability of owners to an invitee for negligence in failing to render the property or chattel reasonably safe for the invitee or in failing to warn him of danger thereon, is predicated upon a superior knowledge concerning the dangers of the property to persons using same. 38 *Amer. Jur.,* Sections 96-97, pp. 754 through 757. *Herbert v. Ziegler,* 39 Atl. 2d page 699. In the instant case, it is without controversy that the Appellee and its employees had superior knowledge of the horses and their propensities. Their failure to warn Appellant

of these propensities or protect him from harm breached their common law duty and was a proper basis for liability. Failure to so charge the jury was error.

STATEMENT AND ARGUMENT REGARDING POINT FIVE.

The Court erred in failing to submit instructions relative to the law pertaining to implied warranties.

In the absence of any notice to the contrary, there is an implied warranty to the rider in contract for renting a horse for riding purposes that the renter knew or had exercised reasonable care to ascertain the habits of the horse and that the horse was safe and suitable for the purpose for which the renter rented the horse. *Palmquist v. Mercer,* 272 P.2d 26.

It would seem to be a fundamental law that in every case where a horse is rented to another for riding purposes for a consideration, that there is a warranty by implication that the horse is suitable for the purpose intended. This would seem to be the majority rule and one that is well established by Appellate Courts in the horse bailment cases that have been decided.

In the present case, Appellant rented a horse for the purpose of walking on a trail to a scenic lake located a mile from Many Glaciers Hotel in Glacier Park, Montana. The evidence would show that the Appellant made it clear to the Appellee's guide that he was not an experienced horseman and had not ridden horses for many years. At this point the Appellee

had a duty to warrant that the horse rented to the Appellant was of a type that would be suitable to carry an inexperienced rider, and that the horse would under no conditions enter into any unusual gait or attitude which would result in loss of balance, position, or control of the mount. Persons who rent horses in national parks have a right to rely on the fact that horses rented to them will walk in a slow and regular manner and that they will not enter into an attitude which will create any danger for an inexperienced rider. It cannot be maintained that a running or galloping or cantering horse is being controlled in such a manner as to provide a safe seat for the inexperienced rider renting him.

The Court, through its failure to instruct the jury on the implied warranties that exist in this case, failed to give the jury the law which would have allowed them to find that the Appellee, through its agent, had breached its implied warranties, and the Appellant was thusly prevented from receiving the full benefit of the applicable law pertinent to his case.

STATEMENT AND ARGUMENT REGARDING POINT SIX.

The District Court erred in failing to submit written instructions and issues, which were timely submitted, relative to the application of the rule of contributory negligence, as defined and tendered by the Plaintiff. Of necessity, in every controversy involving negligence or the absence thereof, there are two parties: the defendant and the person injured, or his

representative. Since knowledge of the parties is the test of liability, the question of liability is sometimes resolved in a negligence action as one of comparative knowledge—the knowledge of the defendant as against the knowledge of the person injured. In more familiar form, the proposition is as follows: liability is established when it is shown that the peril, being of the defendant's creation, was known to the defendant but not to the person injured. * * *

Fault can be predicated upon a person's conduct only where such conduct was a violation of duty on his part to exercise due care. There is no contributory negligence without violation of some duty and there can be no contributory negligence when no duty is placed on plaintiff to exercise care. *Knight v. La-Grande,* 127 Oregon 76, 271 Pac. 641, 61 A.L.R. p. 256; 38 *Amer. Jur.* pp. 858, 859 and 862.

The Court's instruction to the jury in regard to the Appellant's contributory negligence was erroneous and prejudicial to his rights.

STATEMENT AND ARGUMENT REGARDING POINT SEVEN.

The Court failed to allow the Appellant to amend his complaint as allowed under the authority of Rule 15(b), so as to add another count of negligence to Appellant's complaint, it being alleged as negligence the failure of Appellee's guide to instruct the Appellant in the propensities of his mount to follow and do everything that the lead mount would do.

Rule 15(b) of the Federal Procedure says as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, and the court may allow the pleadings to be amended AND SHALL DO SO FREELY when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

The Court seriously limited the Appellant's right to present all aspects of Appellee's negligent conduct by its failure to allow the requested amendment at the conclusion of Appellee's case (Tr. p. 16).

Under Rule 15(b), an amendment shall be allowed to conform the pleadings with the actual issues and proof upon which the case was tried. In the case at bar, the record indicates that Appellee through its agent, wholly failed to instruct or advise Appellant, in any way, as to the propensities of his mount to suddenly break into a gallop or canter when and if the Appellee's lead horse should do so (Tr. p. 50).

This evidence was squarely presented to the jury, and the jury should have been allowed to consider this failure or omission on the part of the Appellee's guide, as a further count of negligence upon which to base the liability of the Appellee.

The test to be applied in all cases where an amendment is requested, is to consider whether or not Appellee would be prejudiced by such an amendment. In the case at bar it is obvious from the record that the Appellee could not have been prejudiced in any manner, as such proof was elicited from Appellee's own guide and agent. Appellee having examined the witness fully and met the issues squarely, cannot fairly state any argument that he would have been prejudiced by such an amendment.

Appellee did not object to nor cross-examine the guide Virgil Dillon as to such line of questioning pertaining to whether or not Appellant had riding experience, or was given instructions prior to mounting said horse (Tr. p. 50). It would seem that such failure of Appellee to object or cross-examine the witness would, by consent, create the right to amend the complaint at the conclusion of the evidence so as to allow a formal allegation of negligence based on such theory.

Rule 15(b) provides that issues tried by express or implied consent should be treated as if raised in the pleadings. The Court must make findings on such issues and failure to submit a case to the jury on a particular theory which is presented by the evidence may be grounds for a new trial, even though the evidence is not sufficient to support the verdict on the

theory on which the case went to the jury. *Levin v. Coe* (App. DC 1942), 132 F.2d 589, 6 FR Serv. 15b 1, Case 2; *Wall v. Brim* (CCA 5th, 1943), 138 F.2d 478, 7 FR Serv. 15b 1, Case 3; *Franklin v. Columbia Terminals Co.* (CCA 8th, 1945), 150 F.2d 667.

CONCLUSION.

The Honorable Trial Court erred in his interpretation of the doctrine of assumption of risk, as the record shows that this doctrine is or was inapplicable. The defense of assumption of risk is an affirmative defense and must be proven by the defense. Hence, the Appellee failed to discharge his burden of proof on this point, and such instruction by the Court deprived Appellant of a fair trial.

The Honorable Trial Court's refusal to submit to the jury instructions offered by Appellant that a hired animal is a bailment; his refusal to submit to the jury an instruction relative to the duty of a common carrier; his refusal to submit to the jury an instruction relative to the law of implied warranty and bailment contracts, so limited the jury's consideration of this cause of action as to amount to a directed verdict in behalf of the Appellee, and deprived Appellant of a fair consideration by the jury of his cause.

Appellant earnestly contends that the Court erred in failing to allow Appellant to amend his complaint under and by virtue of the authority of Federal Rule 15(b), thus depriving Appellant of the additional count of negligence that Appellee's guide failed to

instruct Appellant as to the traits of the mount in question, following and performing in the same manner and gait which the Appellee's mount would perform. Appellant's request to amend was timely requested and filed and the Court's failure to allow said amendment was the grossest of error.

Appellant earnestly submits that in view of the points relied upon, and the law discussed in the cases cited above, consistent with justice within our framework of law and statutes, that the same demands the reversal of this cause and the remanding of same for a new trial.

Respectfully submitted,

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